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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 436

MARIO MORANO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

PETITIONER'S REPLY BRIEF

Argument

POINT I

Petitioner has been compelled to file a reply brief herein because of the incorrect and misleading statement contained in respondent's brief. The statement has no basis in the record and may in part be attributed to respondent's eagerness to accentuate its theory of the case, with a resultant sacrifice to the true factual presentation.

To the petitioner, all other avenues of redress have been closed, save this final appeal, which, to him, is a matter of "death or survival". A word may be juggled in meaning, or a distinction drawn—and it is upon such gossamer

threads of circumstances and reasoning that the fate of the petitioner hangs this day.

Respondent states that as of June 1942, petitioner acquired all the stock—forty shares. This is incorrect. Petitioner never owned more than 13⅓ shares. In April 1942, petitioner provided the funds for the transfer and assignment of 13⅓ shares from Edward L. Krebs directly to Theresa Morano, his wife (R. 37). Later, in June 1942, he again provided funds for the transfer and assignment of 13 shares from Joseph Liloia, a dissident stockholder, directly to his two children, as beneficiaries (R. 38). Thus, to state, as respondent has, that as of June 1942, petitioner acquired all the stock is misleading.

Respondent states that the agreement of limited partnership was executed in October, 1942. This statement is absolutely unfounded. The agreement of limited partnership was dated and executed on March 22, 1943 (R. 114, 112, 124). This date has never been questioned heretofore.

Respondent then states that during the tax years, 1943 and 1944, Salvatore and Rosemarie performed miscellaneous tasks in connection with the business after school and during vacations. Respondent here is guilty of violating a basic and time-honored concept of the law of evidence. Respondent stipulated in open court with petitioner, which stipulation is part of this record (R. 110, 85), as follows:

> "In March 1943, the son, Sal Morano, became a full time member of the business, devoting all of his time and efforts to the company" (R. 111).

See Wigmore on Evidence, 1940 Ed., Vol. 9, section 2590, as to the effect of a judicial admission being conclusive upon the party making it. "The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, i. e., the prohibition of any further

dispute of the fact by him, and of any use of evidence to dispute or contradict it."

See also section 2588 *supra*, wherein Professor Wigmore discusses the theory of judicial admissions: "An express waiver, made in court or preparatory to trial, by the party or his attorney, conceding for the purpose of the trial the truth of some alleged facts, has the effect or a confessory pleading in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. That is what is commonly termed a solemn—i.e., ceremonial or formal—or judicial admission or stipulation. It is in truth a substitute for evidence, in that it does away with the need for evidence."

The Supreme Court has also given utterance to this proposition in *Oscanyan* v. *Arms Co.*, 103 U. S. 261 at 263, in which Justice Field speaking for the Court, held:

> "In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the grounds of the court's procedure equally as if established by the clearest proof."

In addition to the stipulation of facts between the parties, respondent made what Professor Wigmore terms a quasi-judicial admission when he introduced exhibit E, the affidavit of Joseph Volpe (R. 120), as part of his case. Respondent became bound by this testimony, and established petitioner's legal right to rely upon the full evidential value of this admission by the respondent.

Therein (R. 120-121) respondent proved, as part of his case, that, "this work continued during the years 1943 and 1944, and that the amount of hours which the said Theresa

Morano and Rosemarie Morano devoted to said work averaged ten to twelve hours a day."

Can respondent be heard to say that he now disavows this quasi-judicial admission? Can respondent now call upon this court to ignore the stipulation of facts, which is part of the record. To ignore the stipulation of facts between the parties would be a definite miscarriage of justice, not only on the petitioner, but those charged with the conduct of this litigation, who having placed complete reliance upon the conclusive effect of the matters contained in said stipulation, dispensed with proof that was otherwise available, in an effort to expedite the proceedings.

Respondent states that during the years in question, Theresa received $2,100.00 as compensation for services rendered, Rosemarie, $1,400.00 and Salvatore $495.00. This statement is misleading. Reasonable compensation for the year 1943 was determined by the Tax Court as follows (R. 11, 127).

Theresa Morano	$900.00
Rosemarie Morano	100.00
Salvatore Morano	nothing

For the year 1944, reasonable compensation was determined by the Tax Court as follows: (R. 14, 127)

Theresa Morano	$1,200.00
Rosemarie Morano	1,300.00
Salvatore Morano	495.00

In this case, the Tax Court in making the allocations was guided by the amounts the various members of the partnership had withdrawn from their share of the profits, and the record conclusively establishes that the Tax Court used the amounts withdrawn, or these drawing accounts, as the correct measure of the worth of the respective individual part-

ners. There is nothing in the record to indicate that these amounts were paid to the partners as actual compensation.

Point II

The foregoing statement by the respondent is so palpably incorrect and misleading that petitioner has been constrained to take issue with it, not only as it concerns the facts, but also as it concerns the law, for misleading facts will only breed misleading law. Respondent has misinterpreted the facts of this case in a manner to detract from the true dispensation of justice by this Court.

Respondent's argument in turn is predicated upon the acceptance by this Court of his incorrect statement of facts. For example, respondent argues, on page 5 of his brief, that the wife and children made no genuine contribution of capital to "the partnership", for they merely gave that which they had *shortly before* received as a gift from the taxpayer. To the respondent, who had inadvertently attempted to whittle down the time interval, "shortly before" meant four months, *i. e.* from June to October, 1942. As shown and corrected by the petitioner (supra) the time interval was almost a year. From respondent's viewpoint, the closer the time interval approached that involved in the *Tower* and *Lusthaus* cases, the more applicable would those cases become on the facts. It is respectfully submitted that this lapse of time is of sufficient import to warrant this correction.

Respondent invariably interjects the tax-savings scheme as a prime factor motivating a partnership. Taxpayers are constantly confronted by this mode of attack. When the partnership was formed in this case, the business was for all practical purposes defunct. Whatever profits existed were only in contemplation. Assuming further that there were *present* profits, are legitimate savings in taxes to be maligned to the extent of showing bad faith?

Respondent, on the other hand, has avoided issue with the matters which are of paramount concern. Respondent's generalization that this case turns upon the particular facts does not meet the issue. The same may be said of any other case before this court. The matter of paramount concern is the exposition of the principles of law to be applied in these partnership cases, not only in the present case, but to a multitude of other cases now pending before the courts of this country. There has been much uncertainty concerning this subject, especially in view of the conflicting decisions in the Courts of Appeals and the Tax Court. Three of the most recent cases from the Tax Court dealt directly with this subject. There are other cases pending in the various Courts of Appeal. Unless some clarification is handed down by this Court, the uncertainty which is now prevalent, will continue to prevail.

Petitioner respectfully requests that this Court review the reasons relied on for the allowance of the Writ of Certiorari, and the issues therein presented. It is there that the matters of paramount concern are raised. It is upon these issues that petitioner respectfully carries his case to the bench of this tribunal.

Respectfully submitted,

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